COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1710-CR **Cir. Ct. No. 2007CF318**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY M. RAHMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Jeremy M. Rahmer appeals from a judgment convicting him upon a plea of no contest to operating with a prohibited alcohol concentration (PAC), fifth offense, contrary to WIS. STAT. § 346.63(1)(b) (2007-08).[1] He contends the trial court erroneously denied his motion to collaterally attack a prior conviction for which he claims he was denied his constitutional right to counsel. We conclude that the State carried its burden of showing that Rahmer's waiver of counsel was valid. We affirm.

¶2 In July 2007, the State charged Rahmer with operating a motor vehicle while under the influence of an intoxicant and while with a PAC. It charged both as a fifth offense because he had convictions in 1993, 1994, 1998 and 2002. Rahmer at first challenged, through counsel, two prior convictions. Eventually he moved to collaterally attack only the 1998 conviction on grounds that he was denied his constitutional right to counsel in that case. The trial court had not held a waiver-of-counsel colloquy that conformed to the standards set out in ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997).

¶3 The trial court accepted Rahmer's no-contest plea to PAC and left open for later determination whether it would sentence him as a fourth- or fifth-time offender.

¶4 After two false starts,[2] Rahmer ultimately submitted an affidavit that the State conceded and the court deemed facially sufficient to make a prima facie showing of a violation of his constitutional right to counsel within the meaning of

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

[2] Rahmer's attorney submitted the first affidavit. Rahmer submitted the second, but it offered only vague, conclusory statements relative to the waiver.

State v. Ernst, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92. After an evidentiary hearing, however, the court concluded that the State proved by clear and convincing evidence that Rahmer knowingly, intelligently and voluntarily waived his right to counsel in the 1998 case and elected to proceed pro se. Accordingly, it sentenced Rahmer for a fifth offense. Rahmer appeals.[3]

¶5 A person charged criminally with violating WIS. STAT. § 346.63 may collaterally attack prior convictions that are being used as predicate offenses for sentence enhancement under WIS. STAT. § 346.65. *See* ***State v. Foust***, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997). The only permitted basis for the collateral attack is a denial of the constitutional right to counsel in the prior case. ***Ernst***, 283 Wis. 2d 300, ¶22. A valid collateral attack requires the defendant "to point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Id.***, ¶25. If the defendant makes a prima facie showing, the burden then shifts to the State to show by clear and convincing evidence that the defendant in fact possessed the constitutionally required understanding and knowledge that the defendant knowingly, intelligently, and voluntarily entered the plea. ***Id.***, ¶27. We review these questions de novo, but we benefit from the trial court's analysis. ***Id.***, ¶10.

[3] The notice of appeal states that Rahmer appeals from the dispositional order entered on April 8, 2008. The record contains a transcript of the court's oral ruling, but does not reflect that a written order denying the motion was entered. Therefore, we construe Rahmer's appeal as being taken from the subsequently entered judgment of conviction.

¶6 The only issue on appeal is whether the State carried its burden of demonstrating that Rahmer knowingly, intelligently and voluntarily waived his right to counsel in his 1998 case. Rahmer first argues that he could not have entered a valid waiver in the 1998 matter because the trial court failed to engage in a ***Klessig*** colloquy to confirm that he knowingly and voluntarily waived his right to counsel. We disagree. As the State observes, the absence of a ***Klessig*** colloquy is only the first step in determining whether a collateral attack can succeed. It can be part of the body of facts to which a defendant points to demonstrate a lack of knowledge or understanding to help make his or her prima facie case. The court then should hold an evidentiary hearing to allow the State an opportunity to meet its shifted burden. ***Ernst***, 283 Wis. 2d 300, ¶27.

¶7 Rahmer submitted an affidavit listing thirty items relative to proceeding pro se in his 1998 case. He asserted, among other things, not to have understood that an attorney could have: represented him and spoken on his behalf; advised him about his legal rights and options; explained to and assisted him with legal and court procedures; investigated and explored possible defenses; and assisted him at sentencing. He also claimed not to have understood that he could have sought to have a lawyer appointed, hired an attorney or represented himself.

¶8 At the evidentiary hearing, the State elicited testimony from Rahmer that numerous averments in his affidavit were not accurate. He conceded, for example, that his statement that he did not understand he could have had an attorney represent him was "simply wrong"; that he actually had asked for a public defender but evidently did not qualify; and that he knew he could have hired an attorney at his own expense. He also acknowledged averring that he did not know he could represent himself in the 1998 case when, in fact, that is precisely what he did. Under the court's questioning, Rahmer testified that he had been represented

by lawyers in the past. Also, he expressed a desire to be represented by counsel in the 1998 case, yet he claimed he "really didn't understand what a lawyer [could] do for" him. The State argued that the exhibits and Rahmer's testimony showed that Rahmer appreciated the seriousness of the charges, the general range of penalties and the difficulties and disadvantages of self-representation, and that it was a financial decision, not a lack of understanding that prompted Rahmer's decision to proceed pro se.

¶9 At the conclusion of the hearing, the court found that some of Rahmer's testimony "seem[ed] a little weak and self-serving," and was not entirely believable. We accept the court's conclusion that Rahmer's testimony lacked credibility. *See* ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. We also agree with the State that Rahmer's testimony and actions in his 1998 case demonstrate that he understood his right to an attorney and voluntarily waived that right. He admitted making statements in his affidavit easily shown to be untrue. He acknowledged signing the waiver form detailing a defendant's right to an attorney in criminal proceedings. His own attempt to seek a public defender appointment conveys that he understood both his right to counsel and the benefits of retaining an attorney.

¶10 We conclude the State carried its burden in deflecting Rahmer's collateral attack of the 1998 conviction. We affirm the judgment convicting him of operating a motor vehicle with a PAC, fifth offense.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.